Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	
	)	
Development of Competition and Diversity	)	MB Docket No. 07-42
Video Programming Distribution and Carriage	)	FCC 18-80
	)	MB Docket 17-105
Modernization of Media Regulation Initiative	)	

To: The Commission

COMMENTS OF Charles H. "Charlie" Stogner, President, LAPA and CEO, StogMedia

These comments are submitted by Charles Stogner, both in his role as President of the Leased Access Programmers Association (LAPA) and StogMedia, a proprietorship airing television style programming through use of leased access at multiple sites throughout the U.S.

LAPA serves as a national trade association to promote the interests of video producers using or wanting to use, commercial leased access for distribution of their programming. Membership is open to all persons who use or want to use leased access and associate membership is available to equipment suppliers, attorneys, government officials, cable companies and other persons/entities that do business with or have an interest in leased access video production. Or goal is to promote the use of leased access on cable systems, encourage and work with FCC to develop specific rules and regulations concerning the obligations that cable TV operators have in carrying out the mandate of Congress to provide a 'genuine outlet' for leased access programming: to promote choice, diversity

and competition, especially at the local level, which is beneficial to the public interest, as well as encourage FCC to follow Congress's instruction FCC not allow cable operators to exercise any 'market power' over programmers.

This involves the attempt to work with the cable companies to resolve problems that arise from programmers exercising the right to leased access as mandated by Congress, concerning a number of issues including accessibility; channel/tier placement; coverage areas by targeted zone, insurance requirements; rates; contracts; methods of delivering programming to cable; expense of technical support; competition from cable site's own local origination channels and local 'ad inserts' and FCC's apparent support of cable sites forcing leased access users to accept unreasonable terms and conditions (some even not allowed by law) and lack of specific rules and remedies that leased access users can operate under—especially when cable companies throw roadblocks in the way.

In the past NCTA and ACM when commenting on proposed rule changes have tried to give the illusion that cable's administration of leased access has become more routine as operators have developed standard agreements, and as both operators and programmers have gained more experience. In recent comments, they now complain about the time involved in responding to requests for leased access information and go to the extent of suggesting those seeking access, submit some fee with the request.

As a user of leased access with local programming at sites coast to coast, border to border as well as being president of our national leased access programmers association, I say a

loud Amen to former head of Benton foundation's Andrew J. Schwartzmann's comment that "Leased access was a promising concept that the FCC strangled at birth,"

But I have a hard time believing the ***Commission*** killed it off. It appears more to me from the manner in which the 'career-level' staff, those entrenched 'deep-state' government employees simply let the 'stay' and OMB ruling lend support to the way they have been thumbing their noses at Congress as they ignored specific instructions as they changed rules in favor of operators.

If only members of Congress had kept a closer watch on how the staff recreated leased access in ways detrimental to programmers and how they have far too often ordered in favor of operators in 'petitions for relief', I think some heads would have rolled long ago. The actions have been so insulting to Congress, in some cases doing exactly what Congress told them not to do, that it is amazing some member has not called for the dismissal of some of these staff members. It's a shame the Commissioners are blamed for their staff keeping "the wool pulled over their eyes"

I welcome the opportunity of citing instances where this has occurred and look forward to our being able to participate as FCC readdresses leased access.

For starters let me share I have significant experience with cable and local media management. I include local media because admit or like it or not, cable does have a role and responsibility in media in the communities where they hold franchises. It's more than

ironic that from among the early pioneers who founded Comcast, Ralph Roberts, Julian Brodsky and Daniel Aaron. Aaron is attributed as saying, “Our goal was to be a local company and not to be considered "foreigners" who pulled money out of the community”. Today Comcast is a mega-system in an industry that has for the most part forsaken that goal with local cable no longer even trying to be part of the local community. Through the years, I’ve had the opportunity of having business associates, Alan Torrence and Ronnie Slaughter, who were cable pioneers, who secured the franchises, financing, constructed, marketed and managed local sites and from them learned a lot about cable from the management view. At some point Alan and I were involved in the startup of what became a multi-state wireless cable system and Ronnie and I while involved in marketing a KU band satellite programming enterprise discovered leased access, creating StogMedia.

I believe what I learned from these two about cable management along with my own business operations; owning and publishing several weekly newspapers, an advertising firm and a few non-media enterprises, I can say those cable operators wailing about the time and expense handling leased access are only shedding ‘crocodile tears’. With leased access being a law since 1984 it’s hard to imagine any cable operator not being aware of the requirements when developing or purchasing an existing system. With that in mind its hard to understand that one of the first matters of business, along with establishing and having available subscription rates, order forms and other normal business files, they would not have compiled all leased access info in file form to have available if and when a request for such was ever turned in. With office workers already in place it should only

take a few minutes, perhaps only seconds, to answer the request, not the hours they seem to have complained to OMB would be involved.

While addressing the 'big lie' of the time in answering responses, let's address the issue of 'bona fide' requests. It appears now cable wants to only have to respond to these.

Okay, what is a 'bona fide' request? Here's what FCC says it is:

Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information as per FCC:

(i) The desired length of a contract term;
(ii) The time slot desired;
(iii) The anticipated commencement date for carriage; and
(iv) The nature of the programming.
(4) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

Now bear in mind cable operators want to only have to reply to these 'bona fide' requests but how can items (i) (ii) or (iii) be known by a requestor before they know what airtime would cost at a site, or what 'time slots' are available and how can they know the anticipated date while not having basic information on how the site receives programming, Seems as if this is the old 'putting the cart before the horse' and poses the question, just who at FCC developed this, was it the Commission or those career-level staff members who seemingly go far afield in favoring cable over programmers?

Okay, let's assume someone seeking leased access on a site has somehow provided the above, can they reasonably determine whether to proceed with using airtime without knowing how the cable site physically handles the shows; is it by tape, DVD, flash drive,

FTP; times content must be received to be inserted into designated channels, or perhaps by ‘genuine outlet’ ‘Live TV’? Is this the same ‘genuine outlet’ as non-leased programmers—for example HD or inferior SD?

While considering rules changes for leased access, let’s return to Schwartzmann’s comment that "Leased access was a promising concept that the FCC strangled at birth,"

Two primary objectives stressed to FCC by Congress were, one that leased access be provided a ‘genuine outlet’. In the early days all channels were Standard Definition (SD) bur through the years that has changed where today most, if not all, cable programming is carried in High Definition (HD) yet to my knowledge all leased access is still only aired as Standard Definition, certainly an inferior signal and when compare to HD, no way to be considered a ‘genuine channel’.

The other major matter Congress emphatically instructed FCC was to not permit cable operators to place leased access on channels where the operator had ‘market power’ over leased access. Yet staying in line with what FCC adopted in the very beginning of the rules, that they said in the First Order and Report, *“Each system operator subject to this requirement (leased access act) was to establish “the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system,”* and completely ignoring **Sec.76.971 Commercial leased access terms and conditions.**

(a)(1) Cable operators shall place leased access programmers that request leased access to a tier actually **used by <u>most</u> subscribers** <u>on any tier that has a subscriber penetration of more than 50 percent</u>, unless there are technical or other compelling reasons for denying access to such tiers. The Media Bureau staff determined in 2008 that cable could move leased access from the basic tier to digital tiers provided it was received by more than 50 percent of the total subscriber base. Before explaining how 'more than 50 percent' may often come nowhere near to 'most subscribers', let's understand when leased access law was adopted, there were no or only a few cable channels offering 'ad avails' to local markets. Today with these ad slots being offered in often 40 or more channels, a cable's local ad sales has become the strongest, most aggressive, competitor to leased access for local business TV advertising.

StogMedia has a site at Lake of the Ozarks, Mo., an area highly dependent on tourism yet when Charter moved our programming from the channel received by many if not most of the motels, restaurants and other places where tourists may be to a tier not received by those type establishments and a local resident wrote Charter about the changes, this is what **Jerry Steele, Charter's** Manager of Advanced Media & Alternative Revenue, wrote back. *"We appreciate you taking the time to contact us with your concern about Lake TV.*

On April 17, more than 90 percent of the channels in Charter services areas in Missouri and Illinois were reassigned in order to group channels by genre, (making it easier for customers to find similar programming), 6 channels were upgraded to a digital format

and 28 new HD channels were added. Lake TV was assigned channel 90 from 24. In addition while Lake TV offers a quality advertising product, Charter Media (the advertising arm of Charter Cable) also has a local sales office to help small businesses advertise specifically in the Lake are on major cable networks like ESPN, Fox Sports TBS, TNT, USA and many, many, more… To contact Charter media to advertise please call….."

Now if that's not exercising Market Power, what is?

Let's take one more example of where moving a leased access programmer from a basic channel to the digital tier resulted in revenue in Oct. 2008 being about half what it was the same month, 2007; a serious loss.

One more than one occasion, members of the cable industry and even some at FCC have proposed there seems to be little interest in leased access but if they were only aware of the times parties interested in leased access have been unable to inquire about it due to the difficulty in even finding who to ask at a site; or the times when someone did get a 'live body', they've been told "we don't have any leased access", and those laying claim to 'little interest' aren't aware our association website has had 15,227 registered viewers. As I compose these comments, I've been personally retained to secure dozens of sites for a faith based group to develop a new network, using leased access and today's broadband capability in lieu of expensive satellite delivery.

While on the topic of broadband (using public Internet) it needs to be noted that FCC's staff ruled in favor of a cable operator denying providing their broadband service in the headend at no cost to receive a leased access signal to be inserted in the channel through use of the LAPer supplied equipment. Let's explain.

StogMedia requested Cable One to provide them 'cost free' modem service where they were using this very same signal deliver for their local origination channel for commercial programming a practice that was subject of a an article at ***keywesttechnology.com***. However FCC quoted Cable One as stating no other programmer – leased access or otherwise – currently uses the broadband capacity at issue to deliver programming to its headends. Obviously revealed in the published article, this simply isn't true. Some may say Cable One lied in this matter and FCC's paid staff accepted Actually Cable One takes allowing non-leased programming providers a step further. There are headends where they have third-party local ad insert operators delivering the ads via Cable One provided broadband modems. But the manner in which FCC's staff handles 'petitions for relief' does not allow for a means for the petitioner to present evidence.

Hopefully as the Commissioners themselves look into rules, they'll see the need for definitive ones covering things like broadband use in signal delivery.

The refusal of the Media Bureau to address this and discuss it with those of us subjected to the power cable has over our delivery has led itself to where today Charter (now Spectrum Reach) recently informed a programmer they must use the systems' fiber to deliver content that will only be airing three (3) hours a day, two (2) days each week at a total cost of only $78 per week. Cost of fiber to deliver this? Programmer is afraid to even ask,

Let's bring up another matter the Commissioners themselves need to have their staff hold some meetings which include programmers and that's the matter of insurance.

While FCC declines or refuses to specifically state what insurance a cable operator may require a leased access programmer to provide proof of carriage, one can find the following in the order in one petition: "…i*n light of the removal by Congress in amended [S]ection 638 of cable operator immunity for carriage of obscene programming." Specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require were not adopted in the Second Order, on the grounds that "a specific restriction might not be appropriate for all situations." Instead, the Commission stated that insurance requirements must be reasonable in relation to the objective of the requirement. The Commission further stated that determinations of a "reasonable" insurance requirement will be based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors. The burden of proof in establishing reasonableness was placed on cable operators.'*

It can be pretty well established from various sources in FCC published materials the type of coverage permitted is 'Media Perils". In fact, the Media Bureau said in one petition, "*the general liability matters for which (the cable operator) demands insurance coverage from Petitioners appear substantially no different from those confronted by any business enterprise that interfaces with the public. Accordingly, we find that the requirement that*

Petitioners provide what amounts to re-insurance coverage for matters normally covered by its own insurance policies to be unreasonable."

So in order to provide the Commissioners evidence of how the Media Bureau ruled in the case of StogMedia vs Cox, we look at the following.

StogMedia had requested leased access carriage at Las Vegas but was denied when they failed to comply with Cox's demand they name their local agent who would be managing the operation, producing and procuring content for airing, as 'additional insured' StogMedia's carrier had explained this person was already covered under the Media Perils policy which StogMedia had named Cox as 'additional insured'. The amazing factor in this action was that FCC failed to see where Cox had made 'excessive and forceful demands regarding editorial content as if to exercise editorial control'. Perhaps now it can be determined if Cox by insisting on special insurance coverage of a show to be aired by StogMedia was not indeed in violation of Sec. 612/ (47 U.S,C, 421) Cable Channels for Commercial use/ There you find in (C) (2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming…"

Although I previously agreed with the proposal to vacate and revisit the rules, I find I now support the view of LAPA's VP Duane Polich where he writes in his comments: *While we applaud the initiative of the Commission to finally move forward and come to some sort of resolution of the stayed 2008 Leased Access Order, we do not feel that it is*

absolutely necessary to throw the baby out with the bathwater and vacate the entire order and start afresh. Rather we suggest that the Commission move forward with those parts of the 2008 Leased Access Rules that are not subject to the objection of the OMB due to burdensome paperwork requirements, nor are subject to the scrutiny or concerns of the Sixth Circuit Court of Appeals when it issued it stay order. Then the Commission should then look into whether those parts that raised objections or concerns could be modified to "reach a balance of best interest of leased access users and the cable companies".

Perhaps its time now to leave the lawyers out of the room and have FCC's staff finally meet with representatives of our association, LAPA, and have open and extensive discussions of how they see programmers as having been treated, or I suggest 'mistreated' by cable and FCC's staff and finish establishing rules governing leased access.

To my knowledge of this as gained from over 23 years of being a LAPer (leased access programmer) there has never been any real attempt to see the programmer's side. Obviously this involvement of programmers in promulgating rules should have taken place years ago. Maybe since this law was created by Congress, it may be time for Congress to take a serious look at how FCC's staff has ignored some of the matters such as 'market power' and failure to establish adequate rules to see that the law was carried out as prescribed by Congress.

Respectfully Submitted,

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